Supreme Court of the United States

OCTOBER TERM, 1918

No. 957

FREDERICK J. MACLEOD AND EVERETT E. STONE

CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

PETITION FOR WRIT OF CERTIORARI AND BRIEF

HENRY C. ATTWILL
Attorney-General for the Commonwealth of Massachusetts

WM. HAROLD HITCHCOCK
Assistant Attorney-General

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LIST OF CASES CITED.

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v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

Respectfully represents your petitioners, Frederick J. Macleod and Everett E. Stone, as they are the present members of the Public Service Commission of Massachusetts, as follows:

1. On March 28, 1919, the Supreme Judicial Court of Massachusetts, after a rescript from the full court, entered a decree dismissing the petition brought by the Public Service Commission of that state to enforce an order entered by it directed to the New England

Telephone and Telegraph Company, ordering it to cancel certain schedules of telephone rates relating to intrastate toll service put in force by it on January 21, 1919, and requiring it again to put in force the rates for that service existing prior to that date. This order was entered in accordance with authority given to the Commission by the Public Service Commission Act (St. 1913, c. 784, §§ 2, 20, 21), and the petition before the Massachusetts court was a statutory proceeding established for the enforcement of such orders by that act. (St. 1913, c. 784, § 28.)

2. This decree of dismissal was entered solely upon the ground that, as the telephone system of the respondent was now being operated by it on behalf of the United States under the authority of a Joint Resolution of Congress, adopted July 16, 1918, a proclamation of the President dated July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was financially interested in the suit and a necessary party thereto; that the suit was in substance and effect one against the United States, and, as it had not consented to be sued, the proceeding was not within the jurisdiction of the court.

3. On July 16, 1918, Congress adopted a resolution (see Appendix, p. 47) authorizing the President to take possession and assume control of all telephone and telegraph systems and properties and to operate the same for the duration of the war, such possession and operation not to extend "beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace." That resolution contained the following proviso: —

"*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

By a proclamation dated July 22, 1918, the President, by virtue of the powers vested in him by this resolution, and of all other powers enabling such action, took possession and assumed "control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies." The proclamation provided that such possession and control should be assumed from and after twelve o'clock midnight on July 31, 1918. The proclamation then provided: —

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General, Albert S. Burleson. Said Postmaster-General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems.

Until and except so far as said Postmaster-General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary

course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August 1, 1918, the Postmaster-General issued an order announcing that he had "assumed possession, control and supervision of the telegraph and telephone systems of the United States," and directed —

"Until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. Regular dividends heretofore declared and maturing interest on bonds, debentures and other obligations may be paid in due course, and the companies may renew or extend their maturing obligations unless otherwise ordered by the Postmaster-General. All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment. Should any officer, operator or employee desire to leave the service, he should give notice as heretofore to the proper officer, so that there may be no interruption or impairment of the service to the public."

Possession and control of the system of the respondent was assumed in accordance with the terms of this proclamation and order. Since August 1, 1918, that system has been operated by the respondent and its officers and employees solely in accordance therewith. The respondent has entered into a contract with the Postmaster-General determining the amount of compensation that it is to receive from the Government of the United States for the use of its properties. The amount thus determined is not in any way affected

by the receipts from the public on account of the operation of its system.

4. On December 13, 1918, the Postmaster-General issued an order providing that on and after January 21, 1919, the rates for toll service over all the telephone lines and systems under his control, and including the lines and systems of the respondent, should be computed and charged according to a standard schedule set forth in the order. Notice of this schedule having been given by the respondent to the Public Service Commission, it held a hearing thereon, and, on January 31, 1919, entered an order directing the respondent "to cancel forthwith the rates and charges stated in" the proposed new schedules, "which rates and charges have been found by the Commission to be unjust and unreasonable." It further ordered the respondent "to put in force and effect forthwith, and hereafter maintain within the Commonwealth of Massachusetts, the rates and charges for telephone toll service which were in effect prior to January 21, 1919, . . . which rates and charges have been found by the Commission to be just and reasonable." The new schedule of rates, involving intrastate toll rates, was put in effect by the respondent on January 21, 1919. It was not cancelled pursuant to this order and still remains in effect. On February 1, 1919, the present suit to enforce this order was filed.

5. The petitioners contend, —

(*a*) That since August 1, 1918, by virtue of the proclamation of the President, and the order of the Postmaster-General made in pursuance thereof, the respondent, New England Telephone and Telegraph Company, through its officers and employees, has

been, and still is, operating the telephone system owned by it but as an instrumentality of the Federal government and subject to its control so far as validly exercised under the Joint Resolution of July 16, 1918.

(*b*) That by virtue of the express terms of the proviso above quoted, contained in the Joint Resolution of July 16, 1918, there was reserved to the states the right to regulate telephone rates during the period of government control to the same extent that such power existed before government control; that, accordingly, it became the duty of all instrumentalities, officers and employees of the United States operating the telephone systems, and particularly of the respondent, as such an instrumentality, to obey an order of the Massachusetts Public Service Commission relating to intrastate telephone rates otherwise valid or which would have been valid if issued before the period of government control.

(*c*) That it was, therefore, within the jurisdiction of the Public Service Commission of Massachusetts, under the Public Service Act of that State, to enter the order in question, and it was within the jurisdiction of the Supreme Judicial Court of Massachusetts, acting within the statutory powers conferred upon it, to enforce that order and to enjoin the respondent as an instrumentality of the Federal government from violating the express provisions of the Joint Resolution of July 16, 1918, imposing upon it the duty of obeying such order; that the proceeding before the Massachusetts court was not in substance or effect a suit against the United States or to which it was a necessary party, but was merely a suit against an instrumentality of the Federal government to enjoin it from

committing an illegal act by violating an act of Congress; that such an act was in effect a tort against every telephone user in Massachusetts and that the respondent was not protected in such violation of law by the direction of the Postmaster-General.

6. The schedule of telephone rates now in question has been put in force by the direction of the Postmaster-General throughout the country. Many claims as to its illegality have been asserted and suits have been brought both in State and Federal courts in many states, at least in twenty-five states, as the petitioners are informed, seeking to restrain the enforcement of these rates. If the contentions of the petitioners are sound, the telephone users of Massachusetts and of the country as a whole are being required to pay for intrastate telephone toll service at rates in excess of the legal rates which have been put in force in violation of the Joint Resolution of Congress. Such telephone users have no adequate remedy by which they may obtain from the United States, or otherwise, reimbursement for such excessive charges.

Wherefore, your petitioners pray that a writ of certiorari be issued out of this court directed to the Supreme Judicial Court of Massachusetts, commanding said court to certify and send to this court a full and complete transcript of the records and proceedings of said Supreme Judicial Court in this case, which was entitled in that court "Public Service Commission *v.* New England Telephone and Telegraph Company," to the end that such case may be reviewed and determined by this court as provided by law; and that your petitioners may have such other and further relief or remedy in the premises as to this court may

seem appropriate; and that said decree of the Supreme Judicial Court of Massachusetts may be reversed by this court.

FREDERICK J. MACLEOD,
EVERETT E. STONE,
Public Service Commission.

By HENRY C. ATTWILL,
Attorney-General.

By WM. HAROLD HITCHCOCK,
Assistant Attorney-General.

COMMONWEALTH OF MASSACHUSETTS.

APRIL 1, 1919.

SUFFOLK, ss.

I, Wm. Harold Hitchcock, being duly sworn, say that I am an assistant attorney-general of the Commonwealth of Massachusetts; that I prepared the foregoing petition, and that the allegations thereof are true as I verily believe.

WM. HAROLD HITCHCOCK.

Subscribed and sworn to this first day of April, before me.

MAX L. LEVENSON,
Notary Public.

Supreme Court of the United States.

October Term, 1918.

No. 957.

FREDERICK J. MACLEOD AND EVERETT E. STONE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MASSACHUSETTS, PETITIONERS,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, RESPONDENT.

BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI.

INTRODUCTION.

A.

THE QUESTION AT ISSUE IS ONE WITHIN THE CERTIORARI JURISDICTION OF THIS COURT.

This is a petition to bring before this court for review by certiorari a decree of the Supreme Judicial Court of Massachusetts, dismissing a statutory petition brought by the Public Service Commission of that state against the respondent to compel it to obey an

order relating to certain intrastate telephone rates entered January 31, 1918. That order directed it to cancel such rates put in effect on January 21, 1919, at the direction of the Postmaster-General, and to restore the schedule of rates previously in effect.

The respondent pleaded that, by virtue of the existence of Federal control of its telephone system exercised under the Joint Resolution of Congress of July 16, 1918, the proclamation of the President of July 22, 1918, and an order of the Postmaster-General issued August 1, 1918, the United States was a necessary party, and that the suit was in substance and effect one against the United States. The court sustained this plea and entered a decree dismissing the suit as not within its jurisdiction on both of these grounds.

The case is thus one plainly within the jurisdiction of this court to review by certiorari under section 2 of the Act of Congress of September 6, 1916.

1. This decision necessarily involves the validity, under the Joint Resolution of Congress, of the direction of the Postmaster-General to the respondent by virtue of which the rates in question were established without the approval of the Public Service Commission. If this direction was illegal, it did not protect the respondent. Therefore, there was "drawn in question the validity of . . . an authority exercised under the United States," and the decision was in favor of its validity.

2. There was also drawn in question the jurisdiction over this respondent of the Public Service Commission and of the Supreme Judicial Court of Massachusetts, "an authority exercised under any state", as being repugnant to the Constitution of the United States and

the Joint Resolution of Congress, and the decision was against the validity of such authority.

3. An "immunity" from suit under the Constitution of the United States, the Joint Resolution of Congress and the authority of the President and Postmaster-General exercised thereunder was claimed by the respondent and sustained by the state court.

B.

The Case is a Proper One for the Exercise of the Discretion of the Court.

The suit involves the validity of intrastate telephone toll rates put in force in every state in the Union by the Postmaster-General during the period of government control of the telephone systems of the country. Suits have been brought in many of the states, both in Federal and state courts, to restrain the enforcement of these rates. Several of these cases have already reached state courts of last resort, and others will soon be presented to such courts. An original bill in equity is now pending in this court, brought by the State of Kansas against the Postmaster-General, involving similar questions in that state, and it is understood that a case from South Dakota, similar to that presented by this petition, is now pending or is about to be entered in this court on a writ of error.

The fundamental claim in all these cases is that the Joint Resolution of Congress of July 16, 1918, reserved to the states the right of regulating intrastate telephone rates, notwithstanding government control of the telephone systems, to the same extent as that

right existed prior to government control. It is essential to the public welfare that this and all related questions be speedily and finally determined by this court. The case at bar presents those questions in their simplest form, in that resort has been had to all the machinery of state rate regulation in regular course. It involves merely the enforcement of an order of the Public Service Commission which would plainly have been valid before government control.

ARGUMENT OF QUESTIONS AT ISSUE.

The petitioners contend: —

I. That the respondent, through its officers and employees, is now operating the telephone system owned by it as an instrumentality of the Federal government. Therefore, it is a proper party against which a valid order of the Public Service Commission of Massachusetts, relating to intrastate rates in that state, may be directed. Accordingly, it may be required by the Massachusetts Supreme Judicial Court in the exercise of its statutory jurisdiction to obey such an order.

II. The Joint Resolution of July 16, 1918, expressly reserved to the states the right to regulate telephone rates during government control to the same extent as that right existed prior to such control. Therefore, the Commonwealth of Massachusetts had full jurisdiction over the regulation of intrastate telephone rates after and notwithstanding action by the President under the Joint Resolution of July 16, 1918.

III. In view of the provisions of the Joint Resolution of Congress, neither the United States nor the

President nor the Postmaster-General was a necessary party to a suit to enforce an order of the Public Service Commission, directed to the respondent, relating to such rates. Such a suit was not, in substance or effect, one against the United States. It was, therefore, within the jurisdiction of the state court.

IV. The question whether the Public Service Act of Massachusetts is to be interpreted as applying to the respondent, when acting as an instrumentality of the Federal government, is one primarily for the determination of the state court when its jurisdiction has been established. If this court can, and is willing, to deal with it at this stage of these proceedings, it is submitted that it must construe this statute as applicable to the respondent under existing conditions.

We proceed to the discussion of each of these questions.

I.

The Respondent through its Officers and Employees is now operating the Telephone System owned by it as an Instrumentality of the Federal Government.

Prior to midnight July 31, 1918, the respondent was admittedly engaged in operating its telephone system as a public service corporation for the financial benefit of its stockholders. At that time, by virtue of a proclamation dated July 22, 1918, possession and control of all its properties was assumed by the President. It does not appear that any act with reference to these properties, other than the issuing of this proclamation, was performed by or in behalf of the President.

By the proclamation he directed "that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster-General." He also authorized him to perform the duties imposed upon him "through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems." He directed that, until the Postmaster-General shall order otherwise, "the owners, managers, boards of directors, receivers, officers and employees of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case may be."

On August first, the Postmaster-General, in announcing that he had taken possession and control of these systems, issued a general order in which he declared that "until further notice the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels. . . . All officers, operators and employees of the telegraph and telephone companies will continue in the performance of their present duties, reporting to the same officers as heretofore and on the same terms of employment."

So far as the public was concerned, there was no break or change in the operation and apparent control of the system of the respondent. Its business has been continued in precisely the same general manner as before, in the name of the respondent and through the acts of its officers and employees. In fact, there

appears at no time to have been any actual change in the physical possession of its properties. That has always remained in the corporation. There was nothing which amounted to a seizure by any representative of the United States. All that occurred was that the President formally assumed control of the property and the business of the respondent and entrusted that control to the Postmaster-General. The latter in turn directed that "the telegraph and telephone companies shall continue operation in the ordinary course of business through regular channels."

In other words, what was done, both in Massachusetts and throughout the country, was merely to assume control of the companies and through them of the properties, business and employees. The companies were required thereafter to operate in the interest of the Federal government and subject to the orders of the Postmaster-General. In fact, the government took possession of these systems merely by making the corporations owning and operating them its agents. Their possession continued as before, but, on and after August first, that possession was in behalf of the government as its agents.

This is expressly conceded by Mr. Lamar, Solicitor of the Post Office Department, and one of the committee appointed by the Postmaster-General for the Government operation of the telephone systems. In a letter dated January 15, 1919, addressed to one of the petitioners, (See Bill of Complaint, Exhibit B, Appendix C.), he uses this expression, "the New England Company, which, as you are aware, is now and ever since August 1, 1918, *has been operating its properties for the account of the Government* and not for the benefit of its

stockholders." This statement of the legal advisor of the Postmaster-General is utterly inconsistent with any theory that the respondent corporate entity is not still actually operating its system through its officers and employees.

It is obvious that there were no other practical means by which the problem could be handled without serious interruption in the business of these companies. Vast bodies of officers and employees could not be transferred from the service of these companies to the direct service of the United States without their consent. They must continue to be officers and employees of these corporations as before and subject to the direction of their superiors in the service of the corporations. Only in this way could these huge systems be taken over as complete going concerns. The directors, officers and employees of each of these companies stood in no relation whatever to each other except through their mutual relationships to the corporation. To destroy those relationships and to attempt to force upon these employees a direct relationship to the Federal government would have meant a complete disruption of these systems.

Thus the only thing that happened on August first was that the telephone companies ceased to be independent corporations, conducting their own systems for their own financial benefit, and thereafter, though still having the legal title to and the actual possession of their properties, became instrumentalities of the Federal government, exercising their corporate functions, holding and operating their properties and controlling their officers and employees solely as such instrumentalities. They now are subject to the direction of the President

and the Postmaster-General and conduct their systems for the financial benefit of the government. They are paid by the government for the use of their properties and for their services in operating them for the government.

It follows, therefore, that, if the power to regulate intrastate rates has been reserved to the States by the Joint Resolution under consideration, the respondent is the proper agency in Massachusetts against which the exercise of that power should be directed. It is the respondent, through its corporate machinery, that has established and is charging in Massachusetts these new rates. To be sure, it is doing so at the order of the Postmaster-General and not in the exercise of any independent judgment on the part of its officers, but it is doing so by the exercise of its corporate powers and through its control over its employees. It would not be possible for the Public Service Commission to choose any officer or employee of the respondent against whom it might direct its order with any assurance that it was within his power to cause it to be obeyed. Any injunction against the respondent, however, binds all its officers and employees and requires them to exercise the powers of the corporation to bring about obedience to it.

Doubtless, the respondent may find itself in a position where it will be required to choose between obeying a decree of this court and carrying out an illegal order of the Postmaster-General. An alternative of that character, however, is always possible when a superior officer, public or otherwise, seeks to require a subordinate to perform an illegal act. In the case at bar, it cannot be assumed that, when that illegality

has been demonstrated, the Postmaster-General will continue to insist upon his order. Even if that should occur, it would not in any way excuse this respondent from the consequences of its illegal act.

II.

Jurisdiction of Massachusetts over the Regulation of Intrastate Telephone Rates after Action by the President under Joint Resolution of July 16, 1918.

There can be no question as to the power of the Commonwealth to regulate, within constitutional limitations, the rates to be charged by telephone companies for service rendered by them within the State. Such companies are conducting a business charged with a public interest which is as much subject to such regulation as is the business of a railroad.

> Western Union Telegraph Co. *v.* Foster, 224 Mass. 365, 372.
> Primrose *v.* Western Union Telegraph Co., 154 U. S. 1, 14.

Admittedly, the Joint Resolution of Congress under which the President took control of these systems and properties was passed under the war powers of Congress. Unquestionably those powers must be given the widest scope required by the emergency which called them into action. Congress undoubtedly had the power to authorize, or even to require, the taking over of the telegraph and telephone systems of the country by the Federal government for military purposes and "for the common defence."

It may be conceded that it was well within the limits of Federal power, when these systems had thus been taken over as a war measure, entirely to exclude the public from their use, if the exigencies of the war fairly warranted such action. When, however, it has been found not inconsistent with the purpose for which these systems had been taken over to permit the public to continue to use them, it would seem that the determination of the amount to be charged for such use had no relation whatever to the conduct of the war or the exercise of the war powers.

Obviously, Congress could not authorize the taking of these systems by the Federal government solely for revenue purposes even during time of war. It may be suggested that, the systems having been taken over and the public having been permitted to use them so far as not inconsistent with government use, it was within the power of Congress to authorize, and of the President and his representatives to exercise, the regulation of the rates to be charged for such service entirely within a state as a mere incident of government operation for war purposes. If this be so, such regulation must be strictly confined to its mere incidental purpose. It cannot be extended to make the dominant purpose of the exercise of such a power the raising of revenue or, *à fortiori*, the standardizing of telephone rates upon a uniform basis throughout the Nation in the assumed interest of the telephone users of the country, which was the admitted purpose of the establishment of the rates in question. Such action seems to go beyond the scope even of the far-reaching war powers.

However, no such difficult and delicate question arises in this case. Congress foresaw the serious difficulties which might arise from such a conflict between national and state powers at a time when harmony was essential. It, therefore, appears to have determined that these most fundamental powers of the states should be interfered with as little as possible. The resolution as originally drafted, and finally enacted, contained this express reservation to the states: —

> "*Provided further*, That nothing in this Act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

This is an express enactment that action by the President under the resolution shall not "amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States," except to the extent that such regulations may affect the transmission of government messages or the issue of stocks and bonds by the companies whose properties have been taken.

The question now before the court turns entirely upon the interpretation to be given this proviso. Did Congress intend by it to reserve to the states the right to enforce existing statutory regulations for the determination of telegraph and telephone rates? If so, the only question that remains concerns the manner in which this reserved power shall be exercised.

"Lawful police regulations" can only mean regula-

tions established in the lawful exercise of the police power.

Chicago, Burlington & Quincy R.R. *v.* Illinois, 200 U. S. 56.
Railroad Co. *v.* Fuller, 84 U. S. 560, 568.

That power is not restricted as to the regulation of matters connected with the public health, safety or morals, but extends to everything which concerns the public convenience and the general welfare.

Sligh *v.* Kirkwood, 237 U. S. 52, 59.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Eubank *v.* Richmond, 226 U. S. 137, 142.

The Constitution of Massachusetts (Pt. II., c. I., Art. IV.) grants to the General Court full power and authority "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." The power thus granted and defined has long been recognized as the police power.

Commonwealth *v.* Alger, 7 Cush. 53, 85
Commonwealth *v.* Danziger, 176 Mass. 290, 291.

In Commonwealth *v.* Alger, Shaw, C.J., said:—

"We think it is a settled principle, growing out of the nature of well ordered civil society that every holder of prop-

erty, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In that case the defendant was the owner in fee to low water mark of certain lands bordering upon Boston harbor, subject, however, to the public rights of navigation and fishing. The establishment of a harbor line by the Commonwealth, by which the defendant was forbidden to build a wharf beyond that line and to the full extent of his ownership, was sustained solely under

the police power. This general principle was laid down as governing the application of that power: —

> "Whenever there is a general right on the part of the public, and a general duty on the part of a land owner, or any other person, to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it." (Page 95.)

This principle extends to all cases where property is charged with a public interest. The police power is the power which is employed to define with precision the extent of that interest and to regulate the conflicting rights and duties of the individual and the public.

It is precisely this principle that is applied in the regulation of the rates to be established by persons engaged in a business which is held to be charged with a public interest. Upon such persons the duty is imposed of conducting their business and the property devoted to it so as not to impose upon the public which they serve an unreasonable burden for their service. This common-law duty to make only reasonable charges being established, resort must be had to the police power whenever it is desired more clearly to define what charge is reasonable or to establish a method for readily determining that question.

Thus when, in Munn *v.* Illinois, 94 U. S. 113, this court had before it the question of the validity of a state statute fixing maximum charges for the storage of grain, that court at once recognized that it was dealing with the limits of the police power of the states. It approached the question precisely as did Chief Justice Shaw in Commonwealth *v.* Alger, referring

even to the same passages from Lord Hale. In general definition of the power, the court said: —

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the Constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe *v.* R. & B. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." (Page 124.)

It was pointed out that the police power may be thus exercised to regulate rates and charges only in the case of a business or calling which is charged with a public interest. Thus it was recognized to be applicable to the regulation of the rates of common carriers and was held to apply to the similar regulation of public warehousemen.

Since this case and the companion cases in the same volume relating to the regulation of railroad rates, it has never been doubted that it was within the power of the States to fix reasonable rates to be charged by common carriers for purely intrastate service. It has seldom since been necessary to state the precise source of that power. The court has been rather concerned with the manner of its exercise. It has, however, in no way modified the fundamental reasoning of Munn *v.* Illinois, and has frequently recognized that, in cases of this character, it was merely dealing with the limits of the police powers of the states.

Minnesota Rate Cases, 230 U. S. 352.
German Alliance Insurance Co. *v.* Lewis, 233 U. S. 389.
Atchison, Topeka & Santa Fé Ry. Co. *v.* Vosberg, 238 U. S. 56, 59.
Puget Sound Traction Co. *v.* Reynolds, 244 U. S. 574, 578, 579.

The language of the proviso of the Joint Resolution itself shows that the phrase "police regulations" is there used in its broadest sense. The express exceptions from the power reserved to the states show the breadth of that reservation. Neither "the transmis-

sion of Government communications" nor the "issue of stocks and bonds" is a matter that would be ordinarily affected by regulation in the interest of the public health, safety or morals. In fact, the chief if not the only ground for the regulation of the issue of stocks and bonds by carriers or other public service corporations is the close connection between such issues and the rates to be charged by these corporations for their service to the public. Such rates may in general be charged as will give a fair return on invested capital. States attempt to control the issue of stocks and bonds largely to make sure that those issues fairly represent property actually and properly invested in the business, in order to protect the public from paying rates based upon improper investments or an inflated capital.

Thus, the control of the issue of stocks and bonds is but an incident of the power to control rates. If "police regulations" was here used in any narrow sense, the exception would be meaningless. Its inclusion in the resolution plainly shows that these words were intentionally used in their broad sense and included the regulation of telegraph and telephone rates to the extent that the states already possessed such power.

The whole resolution indicates a purpose to authorize the taking of the telegraph and telephone systems for the direct prosecution of the war, but makes clear that, to the extent that the public is to be permitted to use them as before, the regulative powers of the states should not in any wise be limited except as expressly stated. The prosecution of the war required the prompt transmission of government mes-

sages under conditions which would insure secrecy. It had no possible relation to the cost of service to private users of these systems.

The history of the Joint Resolution, particularly of the language of the proviso under consideration, plainly points to the same conclusion. The resolution appears to have been introduced in Congress in precisely the same form in which it was enacted. Various attempts were made to amend it in the Senate, but they were unsuccessful. It is the previous history of the language of the proviso that is important. This language was taken, with only one change made necessary by the different subject matter of the resolution, from the statute approved March 21, 1918, for the operation of the railroad systems under Federal control. Section 15 of that act is as follows: —

> "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

As the Joint Resolution and this statute are dealing with problems of precisely the same character, namely, the manner of operation under Federal control of great systems of communication, previously subject in part to state regulation, it is obvious that the language of the proviso and of this section must be regarded as having been used with precisely the same meaning. The history of section 15 of the Railroad Control Act is in fact the history of the proviso of the Joint Resolution.

No portion of section 15 was contained in the bill as originally drafted. Subsequently in the House, the following clause was inserted: "That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws of the States in relation to taxation." The same words were inserted in the Senate bill on February 21, 1918, by amendment. (56 Cong. Rec., p. 2445.)

On February 28, 1918, the following amendment, inserted at the end of the clause just quoted, was accepted by the committee and agreed to by the House: —

"or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds." (56 Cong. Rec., p. 2820.)

It was later authoritatively stated on the floor of the House by Chairman Sims, of the committee having the bill in charge, that these words "have reference to the police powers of the States." (56 Cong. Rec., p. 3498.)

It is plain that if that section had been finally adopted in this form no claim could be made that the powers of the states to regulate railroad rates had been reserved to them. It would be clear from the language of the exception that any police regulations affecting the control of rates would have been excepted from the reservation.

The insertion of this exception relating to the regulation of rates clearly establishes that the broad term

"the lawful police regulations of the several States", as used in this clause, was regarded as including all matters of rate regulation within the power of the States. The insertion of the exception is conclusive upon this point.

It is obvious, however, that if the bill had been left in this form, the reservation to the states to enforce police regulations would have been a mere shadow, for the subjects excepted embrace the most important of the powers exercised over railroads by the states under their police powers. Recognizing this and with the obvious intention of permitting far less interference with the rights of the states, the words "the regulation of rates, the expenditures of revenues, the addition to or improvement of properties" were struck out as a result of a conference between committees of the Senate and of the House in the final stages of the bill. (56 Cong. Rec., pp. 3241, 3420, 3435, 3443, 3500.) The only conclusion which can be drawn from this action is that the extent of the reservation of powers to the states was carefully considered at the final stages of this bill and that, by this amendment, a clear intention was expressed to reserve to the states their powers of rate regulation.

When there came before Congress the matter of providing for the extension of Federal control from the railroads to the telegraph and telephone systems, it was but natural that the same general policy with relation to the preservation of the powers of the states should be adopted. Thus Congress turned to the provision which it had carefully worked out but four months before with reference to the railroads. It adopted that provision without change and it must be

said to have adopted it with a full appreciation of the meaning so plainly given to it by its history.

Of course, the railroad control act contained more detailed machinery than the Joint Resolution for dealing with the matter of rates, but it contained no provision in any wise inconsistent with section 15 as above interpreted. Even though some of the provisions of that act might be thought somewhat to modify section 15, no such modification can be found in the Joint Resolution under consideration. In that resolution there is no provision whatever, other than that under consideration, having the remotest bearing upon the matter of rate regulation. The proviso must therefore be given its full meaning as disclosed by its plain language read in the light of the history of that language.

Accordingly, the Public Service Commission of Massachusetts submits that the Joint Resolution of Congress, under which the telephone system of the respondent was taken over by the Federal Government and under which it is now being operated, must be interpreted as expressly reserving to that state the same powers with reference to the regulation of the rates to be charged for communication between points within it upon the system of the respondent that it had before the period of Federal control.

III.

This Suit is not beyond the Jurisdiction of the Massachusetts Court on the Ground that the United States is a Necessary Party or that the Suit is in Effect against the United States.

This proceeding is not a suit against the President or against the Postmaster-General. No process or injunction is sought against either. There is no occasion to determine whether it would be within the power of this court to enjoin the Postmaster-General, if he were found within the State, from disobeying the order of the Public Service Commission in violation of the limitations on his authority imposed by the Joint Resolution.

Here the suit is directed, and an injunction is sought, merely against a corporation which, until July 31, 1918, was admittedly subject to all the processes of this court, but which is now acting as an instrumentality of the Federal Government. Doubtless, to the extent that it is acting in accordance with valid Federal authority, and to the extent that it is obeying the valid orders of the Postmaster-General, it cannot be restrained by any court. But it can derive no protection from an order, either of the President or the Postmaster-General, which is in violation of their authority under the Joint Resolution. The respondent is bound by no duty to disobey the Act of Congress merely because the Postmaster-General so directs.

The question of the extent of the exemption of Federal agencies from state interference has been frequently considered by this court.

In National Bank *v.* Commonwealth, 9 Wall. 353, in sustaining the right of a State to require a national bank to pay, in the first instance and on account of its shareholders, a tax assessed upon its shares (*Cf.* St. 1909, c. 490, pt. III., §§ 11–13) the court, at pages 361, 362, said: —

> "The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency, in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States."

Similar questions have arisen with reference to the jurisdiction of states over railroads incorporated by Act of Congress, especially in the case of the Union Pacific Railroad, which was, by an act approved July 1, 1862, in the midst of the Civil War, created for the purpose, frequently reiterated in that act, "of aiding in the construction of said railroad and telegraph line, and to secure a safe and speedy transportation of the mails, troops, munitions of war and the public stores thereon."

In Railroad Company *v.* Peniston, 18 Wall. 5, it was recognized that the Union Pacific Railroad was an agent of the Federal government and that Congress might interpose to protect it from state taxation. In the absence of such action it was held that a tax upon its property was valid.

In Union Pacific Railway Company *v.* Burlington & Missouri River Railroad Company, 3 Fed. 106, the power of the states to regulate the crossing and connection of railroads, and in Union Pacific Railway Company *v.* Leavenworth N. & S. R. Co., 29 Fed. 728, the power of eminent domain of the states, were held applicable to this Federal corporate agency.

In Smyth *v.* Ames, 169 U. S. 466, it was contended that the Union Pacific Railroad was not within the reach of the rate regulating power of any state by reason of the provisions of the Act of Congress of July 1, 1862, creating it. The court made the following answer to this contention (p. 521): —

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the

rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

A similar result had previously been reached as to another railroad of Federal incorporation in Reagan *v.* Mercantile Trust Co., 154 U. S. 413.

In none of these cases is there the least suggestion, even from the parties seeking to impeach the rights of the states to tax or to regulate, that those powers when once conceded to the states by Congress could not be enforced by all valid legal processes against these corporate governmental agencies.

An officer of an agent of the United States is not protected from the legal consequences of his acts or from judicial processes establishing those consequences, even by the fact that he is acting under the color of an express order of the President. If that order for any reason is invalid, the officer may be held liable to pay the damages caused by his act.

Little *v.* Barreme, 2 Cranch, 170.
Belknap *v.* Schild, 161 U. S. 18.

Possession of real property held by him in behalf of the United States and in assertion of its authority may be taken from him by ejectment proceedings.

United States *v.* Lee, 106 U. S. 196.
Tindal *v.* Wesley, 167 U. S. 204.

And the injunctive processes of a court of equity may be employed to restrain him from acting in violation or excess of his authority.

Philadelphia Co. *v.* Stimson, 223 U. S. 605, 620.
School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94.
Noble *v.* Union River Logging Railroad Co., 147 U. S. 164.

In Philadelphia Co. *v.* Stimson, although an injunction was sought against the respondent as a Cabinet officer, the court thus put one side the question of its jurisdiction over him: —

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

As against State officers, the principle under discussion has been frequently recognized by this court in sustaining the jurisdiction of the Federal courts to en-

join such officers from acting under the authority of unconstitutional State statutes.

Smyth *v.* Ames, 169 U. S. 466.
Ex parte Young, 209 U. S. 123.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499, 506.
Cavanaugh *v.* Looney, 248 U. S. 453, 456.

Similarly, those courts will enjoin acts in violation of the Federal Constitution done by State officers in ostensible enforcement of valid State statutes, on the ground that such acts are in excess of the officers' authority and thus not the acts of the State; that is, they will enjoin the unconstitutional administration by State officials of valid State statutes.

Reagan *v.* Farmers Loan & Trust Co., 154 U. S. 362.
Raymond *v.* Chicago Traction Co., 207 U. S. 20.
Home Telephone & Telegraph Co. *v.* Los Angeles, 227 U. S. 278.
Green *v.* Louisville & Interurban R.R. Co., 244 U. S. 499.

The case at bar is closely analogous to these two groups of cases. In those cases, though no suit could be brought against the state, jurisdiction is assumed to restrain a public officer from collecting taxes for the benefit of the state, when the authority under which he is purporting to act is either invalid or does not warrant his attempted action. In the case at bar the claim is that an instrumentality of the United States is attempting to collect telephone rates from

citizens of Massachusetts in violation of the express terms of its authority to act for the United States. In both classes of cases the officer or governmental instrumentality is purporting to act solely for the benefit of the government which he represents. An injunction has the effect of depriving that government of money which it would otherwise receive. After it has actually received it, there is obviously no remedy in the absence of its consent to be sued. But the cases relied upon plainly recognize jurisdiction to prevent public officers or instrumentalities from exacting from the public illegal payments, even though all sums collected are to go into the public treasury.

The cases relied upon by the state court come within an entirely different class. Most of them, including the various cases against the Secretary of the Interior, involve the title to land whose ownership is claimed by the United States. Others, like Belknap *v.* Schild, 161 U. S. 10, and International Postal Supply Co. *v.* Bruce, 194 U. S. 601, involve the right to use property owned by the United States. In such cases, to issue an injunction restraining use of the property by a public officer would be in effect to enjoin the United States from using its own property. Wells *v.* Roper, 246 U. S. 335, was an attempt to enforce specific performance of a contract of the United States by a bill to restrain a public officer from cancelling it. To grant this relief would have been in effect to require the United States to perform its contract. The case of Louisiana *v.* McAdoo, 234 U. S. 627, was an attempt to review the official acts of the Secretary of the Treasury in the enforcement of the customs laws. No one of these cases is in any way comparable to the tax cases above referred to or to the case at bar. In

no one of them was there any claim that a public officer was threatening to require the complainant to make payments into the public treasury which were in violation of law.

The Joint Resolution, interpreted as reserving to the States the power to regulate rates, is in effect a direction by Congress to every Federal officer connected with the operation of the telephone systems and to every instrumentality, corporate or otherwise, employed in that operation, to obey all valid assertions of that power by state authorities. The failure of the respondent as a Federal agency to conform to that direction of Congress is plainly an act in excess of the authority granted it by the Federal government. It is not protected by its abuse of power even by the orders of the Postmaster-General. He, too, would be equally within the reach of the injunction of the state court, if he was personally within its territorial jurisdiction.

If the Joint Resolution or the action of the President under it were unconstitutional, it would plainly follow that the present proceeding would not be a suit against the United States. In that event it would unquestionably be within the jurisdiction of the state court to restrain the respondent from the commission of an illegal act. It can be none the less so, when the ground of the suit is not that Congress has attempted and failed to grant the authority relied upon, but that it has expressly withheld it.

Accordingly, it is submitted that it was within the power of Massachusetts court by proper decree and process to require the respondent, even as a Federal instrumentality to obey all valid orders of the Public Service Commission directed against it.

IV.

The Public Service Commission is authorized by Existing Statutes of the Commonwealth to enforce the Power reserved to the States by the Joint Resolution.

The Public Service Act (St. 1913, c. 784, § 2) establishes the authority of the Commission in part as follows: —

"Section 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto."

Sections 20, 21 and 22 (see Appendix), dealing with the regulation of rates for service, apply to "every common carrier" (§ 20) as defined in section 2.

Plainly, the respondent is furnishing and rendering "for public use within the commonwealth" the service described in section 2 (c). It is, therefore, a common

carrier as defined in section 2, and thus brought within the jurisdiction of the Commission.

To be sure, it is now rendering that service solely as an instrumentality of the Federal Government, but it is still a corporation within the jurisdiction of the Commonwealth. It is still within the power of the Commonwealth, by the express terms of the Joint Resolution, to tax the respondent under St. 1909, c. 490, pt. III., §§ 40–43. Without permission of the Federal Government, doubtless this could not be done. But there is no question but that taxes may be imposed upon such corporate instrumentalities by the states when Congress so authorizes. Such an authority of limited scope has long been in existence as to national banks.

U. S. Rev. Stat., § 5219.
Van Allen *v.* Assessors, 3 Wall. 573.
Mercantile Bank *v.* New York, 121 U. S. 138.
Owensboro National Bank *v.* Owensboro, 173 U. S. 664, 667.
Bank of California *v.* Richardson, 248 U. S. 476, 483.

Therefore, construing the Joint Resolution as reserving to the States the power to regulate intrastate rates, and as the provisions of the Public Service Act are plainly applicable to every corporation furnishing telephone service for the public within the Commonwealth under any circumstance, those provisions must be held applicable to the respondent, even though it is a government instrumentality. This statute would still in terms apply to the respondent without the reservation in the Joint Resolution, but doubtless in that

case it could not be enforced against it while such an instrumentality. If Congress has consented that there shall be no immunity from State regulation on this ground, the plain terms of the statute necessarily apply.

Then the reservation in the resolution is not merely of the police *powers* of the states. In such a form it might be argued that it called for definite exercise of those powers directly against this government instrumentality. The resolution provided "that nothing in this Act shall be construed to amend, repeal, impair, or affect . . . the lawful *police regulations* of the several States." This is a definite declaration that all lawful police regulations then in force or thereafter to be enacted shall not be affected by the action of the President under the authority given him by the resolution. It plainly indicates an intention both to leave in full force *existing police regulations* and also to subject these systems in the Federal control to any future regulation that may be validly enacted.

It is submitted that it cannot be successfully contended that the respondent in its present status does not come within the reach of the powers granted to the Public Service Commission by the Public Service Act.

Respectfully submitted,

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APPENDIX.

Mass. St. 1913, c. 784 (The Public Service Act), provides: —

SECTION 2. The commission shall, so far as may be necessary for the purpose of carrying out the provisions of this or any other act, have general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth, and all persons, firms, corporations, associations and joint stock associations or companies, hereinafter in this act collectively called common carriers and severally called a common carrier, furnishing or rendering any such service or services: —

. . . . . .

c. The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method or system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment utilized in connection therewith or appertaining thereto.

. . . . . .

SECTION 20. Every common carrier shall file with the commission and shall plainly print and keep open to public inspection, schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered or furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form, and with such detail as the commission may order. In the case of common carriers the

forms prescribed for such schedules and the requirements relative to the filing and publication thereof shall conform, as nearly as may be, to the forms prescribed by and the similar requirements of the interstate commerce commission. No common carrier shall, except as otherwise provided in this act, charge, demand, exact, receive, or collect a different rate, joint rate, fare, telephone rental, toll or charge for any service rendered or furnished by it, or to be rendered or furnished, from that applicable to such service as specified in its schedule filed with the commission and in effect at the time. Nor shall any common carrier refund, or remit directly or indirectly, any rate, joint rate, fare, telephone rental, toll or charge so specified or any part thereof, nor extend to any person or corporation any rule, regulation, privilege or facility except such as are specified in the said schedule and regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service. Unless the commission otherwise orders, no change shall be made in any rate, joint rate, fare, telephone rental, toll, classification or charge, or in any rule or regulation or form of contract or agreement in any manner affecting the same as shown upon the schedules filed in accordance with this act, except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when such changes shall take effect, and such notice to the public as the commission shall order, to be given prior to the time fixed in such notice to the commission, for the changes to take effect. The commission for good cause shown may allow changes without requiring the thirty days' notice, under such conditions as it may prescribe, and may suspend the taking effect of changes under the circumstances and in the manner hereinafter provided. At the time when any changes take effect, they shall be plainly indicated upon existing schedules, or new schedules shall be printed and filed, as the commission may order. Nothing in this act shall be construed to prevent any telegraph or telephone corporation